



In the Matter of:

HERBERT E. DICKSON,

ARB CASE NO. 02-029

COMPLAINANT,

ALJ CASE NO. 2001-STA-62

v.

LAKEFRONT LINES, INC.,

DATE: July 24, 2003

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:

Richard A. Millisor, Esq., *Millisor & Nobil, Cleveland, Ohio*

FINAL DECISION AND ORDER

Herbert E. Dickson filed a complaint alleging that the respondent, Lakefront Lines, Inc. (Lakefront), retaliated against him, in violation of the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), for filing safety complaints. A Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Recommended Order of Dismissal (R. O.) dismissing the complaint. The Administrative Review Board (Board) affirms the ALJ's order and dismisses the appeal.

BACKGROUND

Dickson filed a complaint with the DOL's Occupational Safety and Health Administration (OSHA) alleging violations of the STAA. OSHA found the complaint to be without merit. Dickson requested a hearing before a DOL ALJ. The ALJ scheduled the hearing for November 20, 2001. A copy of the notice was sent by certified mail to Mr. Paul O. Taylor on the assumption that he was representing Dickson. In an October 31, 2001 letter, Taylor informed the ALJ that, while he represented Dickson in two other

cases pending before the Office of Administrative Law Judges, he did not currently represent Dickson in this case and had not decided whether he would represent Dickson in this case.

On November 5, 2001, Dickson filed a motion for continuance. He stated that he needed additional time to find an attorney to represent him in the case. He requested three months for discovery and to adequately prepare for the case. He indicated that he would be ready for a hearing on or after February 1, 2002. On November 8, 2001, Lakefront submitted a notice of appearance by Richard A. Millisor, a motion to move the hearing, and a motion to expedite discovery. Copies of the notice and the motions were sent to Taylor. In a November 14, 2001 order, the ALJ granted Dickson's request for a continuance. He noted that there was no indication that Dickson had been served with the notice of appearance and the motions submitted by Lakefront. The ALJ instructed that the Complainant be served with the motions. He stated that the time and place of the hearing would be set after consideration of the parties' motions and responses on the issues of the case.

In a December 7, 2001 order to show cause, the ALJ indicated that the November 14, 2001 Order Granting Continuance, which had been sent by certified mail to Dickson's address, was returned on December 5, 2001 marked "unclaimed" and "return to sender." He also found that on December 5, 2001, Lakefront submitted a notice that it had served the documents on Dickson but that Dickson refused service. Lakefront stated that it had sent the documents to Dickson by regular U.S. mail to Dickson's home address, then by United Parcel Service overnight delivery to the same address, and then again by U.S. mail to Dickson's address. Lakefront stated that all deliveries had been returned unopened and marked "return to sender." The ALJ found that Dickson's refusal to accept service of the Order Granting Continuance and of Lakefront's correspondence, as well as his refusals to accommodate Lakefront's attempts at discovery or any attempt to reschedule the oral hearing, led him to believe that Dickson did not want to pursue the case. The ALJ gave Dickson until December 28, 2001, to show cause why he should not recommend dismissal of the case. In the January 8, 2002 R. O., the ALJ noted that Dickson had not responded to the order, which had been sent to him at his regular address by regular mail and certified mail. He therefore found that Dickson's request for a hearing should be dismissed as abandoned and the recommended dismissal by OSHA should be adopted as the final decision in the matter.

Pursuant to 29 C.F.R. § 1978.109(a)(b) (2002), the ALJ forwarded the case to the Board to issue a final decision and order based on the record and the ALJ's R. O. We issued a Notice of Review and Briefing Schedule informing the Complainant and the Respondent that they were permitted to file briefs with the Board in support of or in opposition to the ALJ's R. O. The Respondent informed the Board that it would rely on the R. O. and chose not to file a brief. The Complainant did not respond to the Board's Notice of Review or a subsequent telephone message.

STANDARD OF REVIEW

Under the STAA, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp. Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making an initial decision." 5 U.S.C.A. § 557(b) (West 1996). See also 29 C.F.R. § 1978.109(c). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution. *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-631. Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." Thus, the Board will affirm an ALJ's recommended decision and order on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his or her case. *LaRue v. KLLM Transport, Inc.*, ARB No. 02-024, ALJ No. 01-STA-54 (ARB July 22, 2003); *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 4 (March 15, 2002); *Curley v. Grand Rapids Iron & Metal Co.*, ARB No. 00-013, ALJ No. 99-STA-39, slip op. at 2 (Feb. 9, 1999).

In *Cohen v. Roberts Express*, 91-STA-29 (Sec'y, Feb. 11, 1992) the Secretary found that the record substantiated that the complainant had failed to accept certified mail and had not responded to several orders issued by the ALJ. She concluded that it was reasonable to assume that the complainant no longer desired to pursue his claim and that it was unfair to the respondent that the case remain open.

In this case, Dickson refused to accept service of the ALJ's Order Granting Continuance and on three occasions refused to accept service of Lakefront's motions. Under 29 C.F.R. § 1978.106(a), hearings are to be conducted under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. The regulations for handling motions and requests provide that if a party to the case fails to comply with the order of the ALJ, the ALJ, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary

delay despite such failure, may render a decision against the non-complying party. 29 C.F.R. § 18.6(d)(2).

The Board finds that there is substantial evidence in the record supporting the ALJ's finding that the Complainant has failed to comply with his order to show cause why the case should not be dismissed. The ALJ, citing well-established legal precedent, was acting within his discretion to recommend dismissal of Dickson's case. On review, the Board issued a Notice of Review and Briefing Schedule giving Dickson an additional opportunity to explain his failure to respond. Furthermore Dickson did not respond to the Board's attempt to contact him by phone. Accordingly, the Board **AFFIRMS** the ALJ's Recommended Order of Dismissal and the complaint is hereby **DISMISSED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge